FILE COPY

IN THE

Supreme Court of the United States

October Term 1960

No. 486

DANTE EDWARD GORI,
Petitioner

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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32. CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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1. The Court below deemed the issues here so "important to the administration of justice" that it acted *in banc* in disposing of the appeal (Pet., App. B, p. 15a). We cannot, consequently, understand the Government's position that review by this Court is not warranted (Br. in Opposition, p. 3).

The basic issue—the impact of the constitutional provision as to double jeopardy in a case where a trial judge declares a mistrial without any urgent necessity therefor—is an important issue not previously considered or settled by this Court. In light of the sharp division among the judges below, there can be little doubt that the problem is a difficult one and needs resolution by this Court. Indeed,

the panel of the Court of Appeals which initially heard the case concluded that petitioner had been unconstitutionally subjected to double jeopardy and that, therefore, his conviction must be reversed; it was only after the *in banc* court intervened that the reversal was supplanted by an affirmance of the conviction.

In short, the history of this litigation below itself is persuasive for the grant of the writ by this Court.

2. The Government's position apparently is that the Federal trial judge's power to declare a mistrial and thus to subject a defendant to a second trial for the same offense must be free and virtually unhampered. It urges encouragement and preservation of a "broad discretion" in the trial court and insists that the "trial judge must be the ultimate arbiter" even though, in so terminating the earlier trial, he acts "with questionable judgment" (Br. in Opposition, pp. 4, 7). In short, what the Government contends for (and what the ruling below sanctions) is a drastic curtailment of the constitutional guarantee against double jeopardy.

Whatever the measure of the trial judge's discretion, the "grave constitutional overtones" in this case justify review by this Court. See *Grunewald* v. *United States*, 353 U. S. 391, 423-424. Beyond this, as noted in our Petition (pp. 11-16), once one permits such unbridled discretion, he necessarily negatives meaningful review and any effective enforcement of the constitutional inhibition.

In *United States* v. *Perez*, 9 Wheat. 579, 580, this Court decreed that the power of the trial judge "ought to be used with the greatest caution, under urgent circumstances,

and for very plain and obvious causes . . . ." That caveat remains timely. The trial court's discretion, by declaration of mistrial, to subject a defendant to a second trial is a narrow one, to be exercised only in "urgent circumstances".

We believe that when it seeks to expose an accused to the jeopardy of a second trial, the Government has the burden of justifying the retrial. Here, however, the Government would shift the burden to the defendant. It would sanction retrial in a Federal criminal prosecution, even where the court may have erred in terminating the earlier trial, unless the defendant were able to show "most exceptional circumstances" why he should not be again tried (Br. in Opposition, p. 4). We insist, however, that the Constitution may not thus be watered down. Such a niggardly reading is in effect a negation of the inhibition against double jeopardy.

3. Relying on Judge Waterman's dissent, we have urged that, unless a defendant himself requests or consents to such action, a trial judge should not be permitted to declare a mistrial because of a prosecutor's misconduct and then subject an accused to a second trial (Pet., pp. 16-20). The Government condemns this argument as an attempt, contrary to *Wade* v. *Hunter*, 336 U. S. 684, 691, "to codify the rules of manifest necessity and double jeopardy into a rigid abstract formula" (Br. in Opposition, p. 5).* Our

* The Government also complains (*ibid.*) that our argument assumes misconduct of the prosecutor notwithstanding that there appears to have been no such misconduct. But if, in fact, the prosecutor was not guilty of misconduct, the declaration of mistrial and the imposition on petitioner of a second trial are *a fortiori* indefensible.

argument, however, is in no sense an abstract formulation. What we are contending for—and what Judge Waterman urged—was recognition and protection of the accused's right to assistance of counsel, which the Sixth Amendment guarantees. The Government ignores the strictures of that Amendment.

We do not say that a prosecutor's misconduct may never properly serve as a basis for a mistrial. In most cases, the defendant, through counsel, will object to such misconduct and demand a mistrial, or, invited by the trial judge, will consent to a mistrial. In such circumstances, of course, termination of the first trial will not bar retrial. But the choice must be with the accused. If, as the majority below suggests and the Government agrees, a trial judge may, in complete disregard of the attitude of the defendant or his counsel, "protect" the accused by declaring a mistrial and subjecting him to the jeopardy of a second trial, a defendant will be deprived of the effective assistance of counsel which the Constitution assures. This is the serious issue which, among others, the decision below presents and which should be settled by this Court.

4. We are mindful, as the Government notes (Br. in Opposition, p. 8), that the mechanics of the *in banc* disposition of appeals by the Second Circuit Court is a matter primarily for that Court. This Court has directed, however, that whatever procedure may be adopted "should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . ." *Western Pacific Railroad Case*, 345 U. S. 247, 267. The court below has ignored that direction. Initial *in banc* dispositions of appeals are handled on an *ad hoc*

basis. Where, as here, such a procedure involves "discharge" of a judge who has heard the case and has voted for reversal of the conviction, and then decision by the *in banc* Court, without affording the defendant-appellant an opportunity to reargue before that court, serious due process problems arise and require examination by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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